In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-375

SHELL CHEMICAL COMPANY, A DIVISION OF SHELL OIL CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E, pp. 19a-38a) is reported at 495 F. 2d 1116. The decision and order of the Board quashing notice of hearing under Section 10(k) in Case No. 4-CD-282 (Pet. App. A, pp. 1a-6a) are reported at 199 NLRB No. 95. The decision and order of the Board dismissing the complaint in Case No. 4-CP-179 (Pet. App. C, pp. 9a-16a) are reported at 199 NLRB No. 70.

JURISDICTION

The judgment of the court of appeals (Pet. App. F, pp. 39a-40a) was entered on July 8, 1974. The petition for a writ of certiorari was filed on October 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board's action in quashing a notice of hearing under Section 10(k) of the National Labor Relations Act (which provides for Board hearing and determination of jurisdictional disputes) is a "final order of the Board" within the meaning of Section 10(f) of the Act and thus directly reviewable in the court of appeals.

2. Whether substantial evidence supports the Board's finding that the union's picketing was not for a "recognitional object" proscribed by Section 8(b)(7)(C) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the appendix to the petition (Pet. App. G, pp. 41a-44a).

STATEMENT

A. The Underlying Facts

Shell is a Delaware corporation engaged in the manufacture and non-retail sale of chemicals at its plant located in West Deptford, New Jersey (A. 81a, 15a).[1] For the past ten years, Catalytic, Inc. ("Catalytic") has performed maintenance services at Shell's plant (A. 82a, 174a, 16a, 31a, 33a). In connection with this work, Catalytic employed a truckdriver named William Pollinger (A. 82a, 174a, 16a). Pollinger transported Catalytic personnel and equipment to the jobsite in a truck, and also operated a forklift, both owned by Shell (A. 174a, 114a, 142a, 154a). Catalytic, at all relevant times herein, has been a party to a collective bargaining agreement with Teamsters Local Union No. 676 ("Local 676"), of which Pollinger is a member (A. 82a, 175a, 16a, 36a).

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[1] "A." refers to the appendix to the briefs in the court of appeals.

On December 9, 1971, Catalytic laid off 11 of its employees, including Pollinger, because Shell had increased the amount of maintenance work done by its own employees and had withdrawn from Catalytic permission to use the truck and forklift operated by Pollinger (A. 82a, 174a, 16a, 40a, 140a-141a, 155a). Catalytic continued to employ 14 or 15 men at the Shell plant (A. 82a, 34a). After Pollinger's layoff and the return of the truck to Shell, the truck was no longer used to make deliveries of Catalytic equipment and was only driven by Shell employees in performing various maintenance duties for Shell (A. 82a, 174a-175a, 16a, 27a-29a, 31a, 115a, 135a). Accordingly, Catalytic employees, who had previously been transported to the jobsite in the truck operated by Pollinger, now walked to the jobsite (*ibid.*).

On December 13, 1971, Moses Jackson, Local 676's business agent, unsuccessfully protested Pollinger's layoff to Catalytic (A. 82a, 175a, 16a, 41a, 140a-141a). Thereupon, on December 21, Jackson wrote a letter to Shell which stated, in relevant part:

> On behalf of Mr. Pollinger, we request that he be permitted to remain on the job performing his duties as before, and the terms of the Teamsters Local 676 agreement covering him be permitted to remain in effect. [A. 82a-83a, 175a, 22a-23a, 45a.]

On December 29, Shell replied, suggesting that Local 676 direct its request that Pollinger be reinstated to Catalytic (A. 83a, 175a, 24a, 46a). Thereafter, Local 676 picketed the Shell plant for 22 days, from January 20 to February 11, 1972 (A. 83a, 175a, 17a, 18a). The pickets carried signs stating, "Shell Unfair to William Pollinger/Unfair to Teamsters Local 676" (A. 83a, 175a, 17a, 27a). On January 26, Local 676 wrote Shell that it was not seeking rec-

ognition from Shell as Pollinger's bargaining representative, and adding:

> We simply request that you employ Mr. Pollinger under similar conditions with similar duties to those he enjoyed while employed by his former employer. [A. 83a, 175a, 26a-27a, 47a.]

B. The Proceedings Before The Board

On January 27, 1972, Shell filed charges with the Board alleging that Local 676 had violated Sections 8(b)(4)(D)[2] and 8(b)(7)(C)[3] of the Act by picketing Shell for the objects of forcing Shell to assign work to Local 676 rather than to its own employees, and of forcing Shell to recognize Local 676 as a bargaining representative.

1. *The 8(b)(4)(D) case (4-CD-282)*

Upon finding that the 8(b)(4)(D) charge appeared to have merit, the General Counsel of the Board issued a

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[2]Section 8(b)(4)(D) makes it an unfair labor practice for a union to engage in, or threaten, a strike for an object of:

> forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work * * *.

[3]Section 8(b)(7), in relevant part, makes it an unfair labor practice for a union to picket an employer:

> where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees * * * (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing * * *.

notice of hearing pursuant to Section 10(k) of the Act,[4] in an effort to obtain a Board resolution of the underlying dispute. A hearing was held before a hearing officer of the Board. Based upon the record of this hearing, the Board concluded that there was not reasonable cause to believe that Section 8(b)(4)(D) had been violated and hence it had no power to proceed to a determination of the dispute under Section 10(k). The Board found that there was no contest between two groups of employees over who should perform particular work (the type of controversy with which Sections 8(b)(4)(D) and 10(k) are concerned); rather, the object of Local 676's picketing was merely to regain work for a former Catalytic employee who had performed such work.[5] Accordingly, the Board quashed the notice of hearing under Section 10(k) which had previously issued. (Pet. App. A, pp. 5a-6a.)

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[4]Section 10(k) provides that, whenever it is charged that a person has engaged in an unfair labor practice within the meaning of Section 8(b)(4)(D):

> the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

[5]On February 9, 1972, subsequent to the filing of the charges, the Board conducted an election at Shell's West Deptford plant in a unit of production and maintenance employees (including those employees doing maintenance work formerly performed by the laid off Catalytic employees); the petition was filed by the Oil, Chemical and Atomic Workers International Union ("OCAW") (Pet. App. A, p. 4a; A. 18a-19a). Local 676 did not intervene or participate in that proceeding (Pet. App. A, pp. 4a-5a; A. 18a-19a, 152a). On June 16, 1972, OCAW was certified as the representative of the Shell employees; at no time has OCAW claimed that the truckdriver job previously held by Pollinger is included in its bargaining unit (Pet. App. A, p. 5a).

2. *The 8(b)(7)(C) case (4-CP-179)*

The General Counsel also issued a complaint on Shell's Section 8(b)(7)(C) charge. However, the Board found that Local 676, in picketing Shell, was not seeking to represent Pollinger for collective bargaining purposes, but only to obtain his employment by Shell under the same wages and working conditions he had enjoyed during his employment by Catalytic. Following its earlier holding in *Fanelli Ford Sales, Inc.*, 133 NLRB 1468—that picketing for the reinstatement of a discharged employee is not *per se* for a recognitional object—the Board concluded that the General Counsel had not established a violation of Section 8(b)(7)(C) and accordingly dismissed the complaint. (Pet. App. C, p. 15a.)[6]

C. The Court of Appeals Decision

Shell petitioned the court of appeals, pursuant to Section 10(f) of the Act, to review the Board's action in quashing the Section 10(k) notice of hearing and its order dismissing the Section 8(b)(7)(C) complaint. The court, concluding that the quashing of a Section 10(k) notice of hearing is not a "final order" within the meaning of Section 10(f), granted the Board's motion to dismiss the petition seeking review of that action (Pet. App. E, pp. 23a-31a). Finding that there was substantial evidence to support the Board's finding that the object of the picketing was reinstatement rather than recognition, the court also denied the petition to review the dismissal of the Section 8(b)(7)(C) complaint (Pet. App. E, pp. 33a-38a).

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[6]The Board distinguished *Waterway Terminals II*, 193 NLRB 477, where it had found a recognitional object, on the ground that there the union had "demanded as the price for withholding pickets an arrangement whereby its members would effect a mass displacement of the employees of Waterway who were represented by another labor organization" (Pet. App. C, p. 14a).

DISCUSSION

1. The review provisions of the National Labor Relations Act, Section 10(e) and 10(f), 29 U.S.C. 160(e) and (f), confer on the courts of appeals jurisdiction to review only "a final order of the Board granting or denying in whole or in part the relief sought * * *." As the court of appeals noted: "[T]he structure of the Act and case law" establish that the "order referred to is clearly that resulting from the culmination of the procedure outlined in Section 10(b) and (c), 29 U.S.C.A. §160(b) and (c), which involves either the dismissal of an unfair labor practice complaint or the granting of relief relating to an unfair labor practice" (Pet. App. E, pp. 24a-25a; footnote omitted).[7] "Since a section 10(k) proceeding is not the dismissal of a complaint of an unfair labor practice or the granting of relief, as provided in section 10(b) and (c),"[8] the court correctly concluded that "the quashing of the notice of a section 10(k) proceeding should not be considered a reviewable order under section 10(f)"[9] (Pet. App. E, p. 26a; footnote omitted).[10]

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[7]See *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, and the other cases cited at Pet. App. E, p. 25a, n. 7.

[8]See *National Labor Relations Board* v. *Plasterers' Union*, 404 U.S. 116, 122 n. 10, 126-127.

[9]The court of appeals added (Pet. App. E, p. 30a):

> Only if there is a determination of the dispute under section 10(k) and a subsequent refusal to comply, does a complaint issue on the unfair labor practice charge and proceed to a Board order. That is, in fact, the only manner in which a section 10(k) work award is reviewable — on review of a section 8(b)(4)(D) order.

[10]Contrary to petitioner's contention (Pet. 19-20), the Board's decision here is not inconsistent with *California Cartage Co.*, 208 NLRB No. 129, 85 LRRM 1289. In that case, the Board found that there was an active dispute between two unions as to whose members would perform the work in question. "Obviously, * * * the claim of the ILWU is in open opposition to the claim of the Teamsters to the work of stuffing or unstuffing containers at California Cartage, LACT Freight-

However, while we submit that the conclusion of the court of appeals is correct and in accord with that reached by other courts of appeals which have considered the question (see cases cited at Pet. App. E, p. 26a, n. 9), the Ninth Circuit, in *Waterway Terminals Co.* v. *National Labor Relations Board*, 467 F. 2d 1011, 1014-1017, held that the Board's quashing of a Section 10(k) notice of hearing is a reviewable order under Section 10(f) of the Act. In view of the conflict of decisions and since the matter is of importance in the administration of the Act, the Board believes that this Court should resolve the issue. However, the Court's decision in *International Telephone and Telegraph Corp.* v. *Local 134, Int'l Bro. of Electrical Workers,* No. 73-1313,[11] argued November 19, 1974, may furnish guidance for resolving the issue and thereby obviate the need for plenary review in this case. Accordingly, we suggest that the petition in this case be held pending a decision in No. 73-1313.

2. Petitioner's challenge to the Board's dismissal of the Section 8(b)(7)(C) complaint (Pet. 23-26) presents essentially an evidentiary issue, namely, whether the object of Local 676's picketing was to secure recognition as the bargaining representative (as petitioner contends) or merely

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care, or Matson." 85 LRRM at 1293. No such dispute exists in the instant case.

Similarly, the Ninth Circuit reversed the Board's finding of no jurisdictional dispute in *Waterway Terminals I,* 185 NLRB 186, because, on its view of the facts, "there were two discrete groups each insisting upon its sole right to perform the carloading duties; the IBU on behalf of its members who had a collective bargaining agreement with Waterway, and were then performing the work; and ILWU which insisted it had the right to have the work assigned to its members who had previously performed it as employees of Interstate." *Waterway Terminals Co.* v. *National Labor Relations Board,* 467 F.2d 1011, 1018 (C.A. 9).

[11]The issue in No. 73-1313 is whether a Section 10(k) determination is an "adjudication" within the meaning of the Administrative Procedure Act. The Board's position that it is not rests, *inter alia,* on the argument that it does not result in a "final order" (see Bd. Br. 14-21).

to secure reinstatment for employee Pollinger (as the Board found). Such an issue does not warrant further review where, as here, the court of appeals found that substantial evidence supports the Board's finding. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491. Nor is review warranted of the Board's underlying premise—first enunciated in *Fanelli Ford Sales, Inc., supra*—that picketing for reinstatement of a discharged employee does not, without more, establish a recognitional object within the meaning of Section 8(b)(7) of the Act. The contrary position would result in sweeping within the ban of that section virtually all types of picketing, contrary to Congress' intention only to proscribe picketing for specified illegal objectives. See Comment, *Illegal Picketing Under Section 8(b)(7)—A Reexamination*, 68 Colum. L. Rev. 745, 753-754 (1968).

CONCLUSION

The petition should be held pending the decision in No. 73-1313, and then disposed of in accordance with that decision.

Respectfully submitted.

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